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No. 98-1036

In the Supreme Court of the United States

STATE OF ILLINOIS, PETITIONER

v.

SAM WARDLOW

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

2 Pet

QUESTION PRESENTED

Whether respondent's sudden and unprovoked flight from an identifiable police officer in a high-crime area gave rise to a reasonable suspicion that respondent was involved in criminal activity, justifying a temporary investigative detention.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument:	
Respondent's unprovoked flight from police officers patrolling a high-crime area gave rise to a reasonable suspicion of criminal activity and justified a temporary investigative stop by the police	7
A. The Fourth Amendment permits limited investigative stops and attendant protective searches based on reasonable suspicion not rising to the level of probable cause	7
B. Flight has historically been treated as probative evidence of involvement in criminal activity	10
C. Respondent's sudden flight from indentifiable police officers gave those officers reasonable suspicion that he was involved in criminal activity	13
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Adams v. *Williams*, 407 U.S. 143 (1972)	8, 9, 14, 17
Alabama v. *White*, 496 U.S. 325 (1990)	9
Alberty v. *United States*, 162 U.S. 499 (1896)	12, 13
Allen v. *United States*, 164 U.S. 492 (1896)	12, 13
Brown v. *Texas*, 443 U.S. 47 (1979)	18
California v. *Hodari D.*, 499 U.S. 621 (1991)	11
Carroll v. *United States*, 267 U.S. 132 (1925)	12
Florida v. *Bostick*, 501 U.S. 429 (1991)	19
Florida v. *Rodriguez*, 469 U.S. 1 (1984)	11
Florida v. *Royer*, 460 U.S. 491 (1983)	4, 18, 19
Gerstein v. *Pugh*, 420 U.S. 103 (1975)	12
Griffin v. *Wisconsin*, 483 U.S. 868 (1987)	7

Cases—Continued: Page

Hickory v. *United States*, 160 U.S. 408 (1896) 12, 13
Husty v. *United States*, 282 U.S. 694 (1931) 11
INS v. *Delgado*, 466 U.S. 210 (1984) 5, 9, 15
Illinois v. *Gates*, 462 U.S. 213 (1983) 14
Illinois v. *Rodriguez*, 497 U.S. 177 (1990) 15
Michigan v. *Chesternut*, 486 U.S. 567 (1988) 11-12
Michigan v. *Long*, 463 U.S. 1032 (1983) 21
Minnesota v. *Dickerson*, 508 U.S. 366 (1993) 9
National Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989) 7
People v. *Shabaz*, 378 N.W.2d 451 (Mich. 1985) 13, 19, 20
Reid v. *Georgia*, 448 U.S. 438 (1980) 16
Sibron v. *New York*, 392 U.S. 40 (1968) 11
State v. *Anderson*, 454 N.W.2d 763 (1990) 16
State v. *Hicks*, 488 N.W.2d 359 (Neb. 1992) 4, 13, 19
State v. *Jackson*, 434 N.W.2d 386 (Wis. 1989) 14-15
State v. *Talbot*, 792 P.2d 489 (Utah Ct. App. 1990) 13, 19
Terry v. *Ohio*, 392 U.S. 1 (1968) 4, 5, 8, 20, 21
United States v. *Amuso*, 21 F.3d 1251 (2d Cir.), cert. denied, 513 U.S. 932 (1994) 13
United States v. *Atlas*, 94 F.3d 447 (8th Cir. 1996), cert. denied, 520 U.S. 1130 (1997) 18
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 11
United States v. *Brown*, 159 F.3d 147 (3d Cir. 1998), cert. denied, 119 S. Ct. 1127 (1999) 18
United States v. *Candelaria-Silva*, 162 F.3d 698 (1st Cir. 1998) 13
United States v. *Cortez*, 449 U.S. 411 (1981) 5-6, 9, 17
United States v. *Evans*, 994 F.2d 317 (7th Cir.), cert. denied, 510 U.S. 927 (1993) 18

Cases—Continued: Page

United States v. *Gutierrez-Daniez*, 131 F.3d 939 (10th Cir. 1997), cert. denied, 118 S. Ct. 1334 (1998) 18
United States v. *Hegwood*, 977 F.2d 492 (9th Cir. 1992), cert. denied, 508 U.S. 913 (1993) 13
United States v. *Lender*, 985 F.2d 151 (4th Cir. 1993) 18
United States v. *Lucas*, 778 F.2d 885 (D.C. Cir. 1985) 18
United States v. *Montoya de Hernandez*, 473 U.S. 531 (1985) 9
United States v. *Murphy*, 996 F.2d 94 (5th Cir.), cert. denied, 510 U.S. 971 (1993) 13
United States v. *Pungitore*, 910 F.2d 1084 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991) 13
United States v. *Sharpe*, 470 U.S. 675 (1985) 12
United States v. *Simpson*, 992 F.2d 1224 (D.C. Cir.), cert. denied, 510 U.S. 906 (1993) 10
United States v. *Sokolow*, 490 U.S. 1 (1989) 5, 8, 9, 11, 14, 15
United States v. *Watson*, 423 U.S. 411 (1976) 7, 12
Watkins v. *State*, 420 A.2d 270 (Md. 1980) 13
Wilson v. *Arkansas*, 514 U.S. 927 (1995) 12
Wisconsin v. *Mitchell*, 508 U.S. 476 (1993) 21

Constitution:

U.S. Const. Amend. IV 7

Miscellaneous:

4 William Blackstone, *Commentaries* (St. George Tucker ed. 1803) 12
Wayne R. LaFave, *Search and Seizure* (3d ed. 1996):
Vol. 2 18
Vol. 4 16

Miscellaneous—Continued: Page

1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* (2d ed. 1994) 13
2 John W. Strong et al., *McCormick on Evidence* (4th ed. 1992) 13
Lawrence P. Tiffany et al., *Detection of Crime* (Frank J. Remington ed. 1967) 10
2 John Henry Wigmore, *Evidence* (James H. Chadbourn ed. 1979 & Supp. 1999) 12, 13

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INTEREST OF THE UNITED STATES

This case presents the question whether and under what circumstances an individual's flight from an identifiable police officer will give rise to a reasonable suspicion of criminal wrongdoing justifying a temporary investigative detention. The Court's resolution of that question will affect the practices of federal law enforcement agents who encounter that situation. The disposition of this case will also affect the admission in federal prosecutions of evidence obtained by federal, state, and local police officers who apprehend suspects after such flight.

STATEMENT

1. On September 9, 1995, Police Officer Timothy Nolan, a nine-year veteran with the Chicago Police Department, was investigating narcotics sales in the

11th District. Officer Nolan and his partner Officer Harvey were among eight officers in four police cars traveling in a "caravan" east on West Van Buren Street. Officers Nolan and Harvey were in the last car of the caravan. Officer Nolan was dressed in full police uniform, which included his badge, name tag, and Chicago Police Department arm patch. At the hearing conducted on respondent's motion to suppress, Officer Nolan testified that the area in question had a high incidence of narcotics trafficking. Officer Nolan further testified that he did not remember if his police car was marked or unmarked. Pet. App. 1-2, 13-14; J.A. 4, 7-10.

As the four cars traveled down West Van Buren, Officer Nolan noticed respondent Sam Wardlow standing in front of 4035 West Van Buren, looking in their direction. When respondent saw the officers approaching, he began to run. He was carrying a white opaque bag under his arm. As Officers Nolan and Harvey followed in their car, respondent ran south down a gangway and through an alley, but the officers caught up with and cornered him. Officer Nolan conducted a protective "pat-down" search of respondent and the bag he was carrying.[1] When he squeezed the bag, Officer Nolan felt a hard object similar in shape to a revolver. Officer Nolan looked inside the bag and found a .38 caliber Colt handgun loaded with live rounds of ammunition. Respondent was then arrested. Pet. App. 1-2, 15; J.A. 4-11.[2]

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[1] Officer Nolan testified at the suppression hearing that he "conducted a protective pat down for [his] own safety" before asking respondent any questions. J.A. 6. The officer also testified that in his experience it is common for weapons to be found in the vicinity of drug trafficking activities. J.A. 11.

[2] Officer Nolan's arrest report indicates that respondent was arrested at 12:15 p.m. Pet. App. 2 n.1, 15.

2. Following his indictment on various weapons charges, respondent filed a motion to suppress the seized gun. After conducting an evidentiary hearing at which Officer Nolan testified to the events leading to respondent's arrest, the trial court denied the motion. J.A. 13-15. The court observed that "[a]lmost anybody can identify a police car marked or * * * unmarked," J.A. 14, and it concluded that "once a person flees after having looked in the direction of the officer there's reasonable—there's reason to think there's a problem, they have a right to make inquiry," J.A. 15.

After a bench trial at which the parties stipulated to the testimony introduced at the suppression hearing, respondent was convicted of unlawful use of a weapon by a felon and sentenced to two years' imprisonment. Pet. App. 15; 12/6/95 Tr. 15-20.

3. The Appellate Court of Illinois reversed. Pet. App. 13-19. The court found Officer Nolan's testimony "simply too vague to support the inference that [respondent] was in a location with a high incidence of narcotics trafficking." *Id.* at 17. The court then held that respondent's "sudden flight from an area past which police officers were driving" was insufficient, standing alone, to "satisfy the requirements for a lawful investigatory stop." *Id.* at 18.

4. The Supreme Court of Illinois affirmed. Pet. App. 1-12. The court found that "Officer Nolan's uncontradicted and undisputed testimony, which was accepted by the trial court, was sufficient to establish that the incident occurred in a high-crime area." *Id.* at 5. It therefore framed the question presented by the appeal as "whether an individual's flight upon the approach of a police vehicle patrolling a high-crime area is sufficient to justify an investigative stop of the person." *Ibid.* The court agreed with respondent that "such flight

alone is insufficient to create a reasonable suspicion of involvement in criminal conduct." *Ibid.*

Relying substantially on the Nebraska Supreme Court's decision in *State* v. *Hicks*, 488 N.W.2d 359 (1992), cert. denied, 507 U.S. 1000 (1993), the court concluded that a rule permitting investigative stops based on flight alone would "upset the balance struck in *Terry* [v. *Ohio*, 392 U.S. 1 (1968),] between the individual's right to personal security and the public's interest in prevention of crime." Pet. App. 7 (quoting *Hicks*, 488 N.W.2d at 364). The court explained:

> Flight upon approach of a police officer may simply reflect the exercise—at top speed—of the person's constitutional right to move on. *Terry* and [*Florida* v. *Royer*, 460 U.S. 491 (1983),] stand for the proposition that exercise of this constitutional right may not itself provide the basis for more intrusive police activity.
>
> * * * * *
>
> A prime concern underlying the *Terry* decision is protecting the right of law-abiding citizens to eschew interactions with the police. Authorizing the police to chase down and question all those who take flight upon their approach would undercut this important right.

Pet. App. 6-7 (quoting *Hicks*, 488 N.W.2d at 363-364) (citation and quotation marks omitted). The court thus agreed with respondent's argument that "[i]f the police cannot constitutionally force otherwise law-abiding citizens to move, the police cannot force those same citizens to stand still at the appearance of an officer." *Id.* at 8.

The Illinois Supreme Court further concluded that the high incidence of narcotics trafficking in the pertinent area did not give rise to a reasonable suspicion that respondent was engaged in wrongdoing. The court noted that the officers "were not responding to any call or report of suspicious activity in the area." Pet. App. 10. It observed as well that respondent "gave no outward indication of involvement in illicit activity prior to the approach of Officer Nolan's vehicle," but "was simply standing in front of a building when the officers drove by." *Ibid.* The court concluded that "because Officer Nolan was not able to point to specific facts corroborating the inference of guilt gleaned from [respondent's] flight, his stop and subsequent arrest of [respondent] were constitutionally infirm." *Id.* at 12. The court accordingly affirmed the judgment of the Illinois Appellate Court reversing respondent's conviction. *Ibid.*

SUMMARY OF ARGUMENT

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), and its progeny, this Court held that the Fourth Amendment permits brief investigative stops based on "reasonable suspicion" of criminal wrongdoing. To protect the safety of the officers conducting such a stop, moreover, when law enforcement officers have a reasonable suspicion that the individual may be armed and dangerous, they may conduct a limited search for weapons. The reasonable suspicion standard does not require an officer to have probable cause to believe that an individual has committed a crime. *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989). Rather, it requires only "some minimal level of objective justification," *INS* v. *Delgado*, 466 U.S. 210, 217 (1984), for believing that the individual "is, or is

about to be, engaged in criminal activity," *United States* v. *Cortez*, 449 U.S. 411, 417 (1981).

Respondent's sudden and unprovoked flight from the caravan of police cars and a uniformed police officer gave rise to a reasonable suspicion of his possible involvement in criminal activity. Law enforcement officers have historically treated flight as a suspicious circumstance warranting further investigation. This Court has repeatedly held that efforts to evade police scrutiny are directly relevant to reasonable suspicion and probable cause determinations. The Court has also recognized that flight may properly be treated as probative (though not conclusive) evidence of guilt in a criminal prosecution.

Flight from an identifiable police officer may be susceptible of innocent explanations. The purpose of a *Terry* stop, however, is not to apprehend persons who are known to be guilty of criminal offenses; it is to clarify situations in which unlawful activity is suspected but probable cause has not been established. Unprovoked flight from identifiable police officers is ordinarily a sufficiently valid indicator of illicit conduct to justify a brief investigative stop. Although such flight *may* be undertaken for innocent reasons, it is not behavior in which innocent persons commonly engage —and it is far more likely to signal a consciousness of wrongdoing and a fear of apprehension. An immediate investigatory seizure is especially appropriate in these circumstances because the effect of flight is often to foreclose the possibility of further observation of the individual that might reveal additional signs of unlawful behavior.

To treat flight as a basis for an investigative stop does not unlawfully impair an individual's right to avoid contact with the police. If respondent had paid no

attention to the officers, or had continued on his prior course of conduct or activity, his decision to do that despite the police presence would not (by itself) have justified an investigative stop. Instead, respondent dramatically altered his conduct in response to the officers' arrival, in an evident attempt to avoid police scrutiny. That pattern of activity is much more aberrational, and much more uncharacteristic of innocent persons, than a simple insistence on freedom from official interference.

ARGUMENT

RESPONDENT'S UNPROVOKED FLIGHT FROM POLICE OFFICERS PATROLLING A HIGH-CRIME AREA GAVE RISE TO A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AND JUSTIFIED A TEMPORARY INVESTIGATIVE STOP BY THE POLICE

A. The Fourth Amendment Permits Limited Investigative Stops And Attendant Protective Searches Based On Reasonable Suspicion Not Rising To The Level Of Probable Cause

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. Under well-established precedent, the formal arrest of an individual is "reasonable" only if it is based on probable cause to believe that the person has engaged in unlawful activity. See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411, 417, 421 (1976). The probable cause standard also applies, as a general matter, in determining the reasonableness of "searches." See, *e.g.*, *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665 (1989); *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987).

Since its decision in *Terry* v. *Ohio*, 392 U.S. 1 (1968), however, this Court has recognized that not every restriction on personal privacy or liberty sufficient to constitute a "search" or "seizure" requires the degree of individualized suspicion necessary to satisfy the probable cause standard. Rather, the Court's decisions establish that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989). As the Court has explained:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. *Williams*, 407 U.S. 143, 145-146 (1972) (citation omitted).

The Court in *Terry* also recognized that an officer should not be required to take unreasonable risks when, in an investigatory stop, the suspect may be "armed with a weapon that could unexpectedly and fatally be used against him." *Terry*, 392 U.S. at 23. Rather, "[s]o long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in

scope to this protective purpose." *Adams*, 407 U.S. at 146 (footnote omitted); see also, *e.g.*, *Minnesota* v. *Dickerson*, 508 U.S. 366, 373 (1993) (an officer in conducting a *Terry* stop may search "on the basis of reasonable suspicion less than probable cause," so long as the search is "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby").

The standard applicable to investigative stops and pat-down searches under *Terry*—a standard most often characterized as "reasonable suspicion"—"effects a needed balance between private and public interests." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 541 (1985). Although the reasonable suspicion standard precludes random or arbitrary seizures, or those based merely on a subjective "hunch," the burden of justification that it imposes "is considerably less than proof of wrongdoing by a preponderance of the evidence." *Sokolow*, 490 U.S. at 7. Rather, that standard requires only "some minimal level of objective justification to validate the detention or seizure." *INS* v. *Delgado*, 466 U.S. 210, 217 (1984); see also, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.").[3]

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[3] Although investigatory stops are often based on the seizing officer's firsthand observation of a suspect's unusual or idiosyncratic behavior, the reasonable suspicion standard can be satisfied even without such observations. For example, an informant's tip may furnish reasonable suspicion for an investigative stop, particularly if some details of the tip are verified independently. See, *e.g.*, *Alabama* v. *White*, 496 U.S. 325, 329-332 (1990). Reasonable suspicion may also exist where an individual closely matches the description of the perpetrator of a prior crime. See, *e.g.*,

B. Flight Has Historically Been Treated As Probative Evidence Of Involvement In Criminal Activity

Under the foregoing principles, respondent's unprovoked flight from the caravan of police cars and a uniformed police officer furnished a sufficient objective basis for the officers to form a reasonable suspicion that he was involved in criminal activity. Law enforcement officers have historically treated flight as a suspicious circumstance warranting further investigation. As one empirical study of police investigative practices concluded, "[c]ertainly, officers on patrol assume that flight is strong evidence of guilt. They almost always attempt to stop and question a person who flees from them, even though they suspect no specific crime." Lawrence P. Tiffany et al., *Detection of Crime* 32 n.19 (Frank J. Remington ed. 1967). Because flight "may seem to indicate both the existence of a crime and participation in it by the person who flees," *id.* at 19, "[a] person who * * * changes his direction in an apparent attempt to avoid confronting [a police] officer, or who flees at the sight of an officer will commonly be detained and questioned," *id.* at 32.[4]

United States v. *Simpson*, 992 F.2d 1224, 1226 (D.C. Cir.) (investigative stop was justified where the seized individual "was wearing clothing similar to that described by the victim, was of the same general age group * * *, was of the same race and physical build of the alleged rapist, and was in the vicinity of the crime"), cert. denied, 510 U.S. 906 (1993). An officer's observation of "suspicious" behavior is therefore a frequent but not a necessary predicate for an investigative stop.

[4] We are aware of no empirical studies regarding the frequency with which persons detained on the basis of flight are found to be involved in criminal activity. Pursuit of fleeing suspects, however, is difficult and potentially dangerous. Officers would likely not devote their energies to the pursuit of fleeing persons unless those

That historical practice is eminently reasonable. This Court has repeatedly held that efforts to avoid police scrutiny are directly relevant to reasonable suspicion and probable cause determinations. See, *e.g.*, *Sokolow*, 490 U.S. at 8-9 (suspect's "evasive or erratic path through an airport," and his apparent use of an alias, were factors relevant to the reasonable suspicion inquiry); *Florida* v. *Rodriguez*, 469 U.S. 1, 6 (1984) ("Respondent's strange movements in his attempt to evade the officers aroused further justifiable suspicion."); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("erratic driving or obvious attempts to evade officers can support a reasonable suspicion"); *Sibron* v. *New York*, 392 U.S. 40, 66-67 (1968) ("deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest"); *Husty* v. *United States*, 282 U.S. 694, 701 (1931) (finding of probable cause for search of automobile was based on, *inter alia*, "the prompt attempt of [the defendant's] two companions to escape when hailed by the officers").[5]

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efforts played a genuine and necessary role in detecting and preventing crime. The absence of any obvious motive for police abuses reinforces the appropriateness of deference to the judgment and experience of trained police officers.

[5] Cf. *California* v. *Hodari D.*, 499 U.S. 621, 623 n.1 (1991) ("That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense."); *Michigan* v. *Chesternut*, 486 U.S. 567, 576 (1988) (Kennedy, J., concurring) ("It is no bold step to conclude, as the Court does, that the evidence should have been admitted, for respon-

To treat flight as evidence of possible criminal conduct is consistent not only with this Court's Fourth Amendment jurisprudence, but with well-established principles of substantive criminal law. More than a century ago, this Court observed that "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." *Allen* v. *United States*, 164 U.S. 492, 499 (1896). Although flight cannot properly be treated as "conclusive proof of guilt," *Hickory* v. *United States*, 160 U.S. 408, 421 (1896), "the flight of the accused is a circumstance proper to be laid before the jury, as having a tendency to prove his guilt," *Alberty* v. *United States*, 162 U.S. 499, 510 (1896).[6]

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dent's unprovoked flight gave the police ample cause to stop him."); *United States* v. *Sharpe*, 470 U.S. 675, 705 (1985) (Brennan, J., dissenting) ("where police officers reasonably suspect that an individual may be engaged in criminal activity, and the individual deliberately takes flight when the officers attempt to stop and question him, the officers generally no longer have mere reasonable suspicion, but probable cause to arrest").

[6] This Court has often looked to common-law principles in assessing the Fourth Amendment reasonableness of various types of searches and seizures. See, *e.g.*, *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995); *United States* v. *Watson*, 423 U.S. 411; 418-419 (1976); *Gerstein* v. *Pugh*, 420 U.S. 103, 111, 114 (1975); *Carroll* v. *United States*, 267 U.S. 132, 149-153 (1925). At common law, flight created so strong a presumption of guilt that the flight of one accused of treason, felony, or petit larceny resulted in the forfeiture of his goods and chattels, whether he was found guilty or acquitted. See, *e.g.*, *Hickory*, 160 U.S. at 418; 4 William Blackstone, *Commentaries* 387 (St. George Tucker ed. 1803); 2 John Henry Wigmore, *Evidence* § 276, at 122 & n.1 (James H. Chadbourn ed. 1979 & Supp. 1999). This Court has moderated the common-law approach, holding that evidence of a defendant's flight may not be treated as raising a conclusive presumption of guilt, while recognizing that such evidence has probative value and may

C. Respondent's Sudden Flight From Identifiable Police Officers Gave Those Officers Reasonable Suspicion That He Was Involved In Criminal Activity

Courts that have refused to treat flight as a sufficient basis for a *Terry* stop have offered two basic justifications for that holding. First, courts have sometimes reasoned that flight by itself is ambiguous, since it may have been inspired by innocent motives. See, *e.g.*, *Watkins* v. *State*, 420 A.2d 270, 273-274 (Md. 1980). Second, courts have expressed the view that an individual's right to avoid contact with police would be impaired if flight were accepted as a sufficient basis for an investigative stop. See, *e.g.*, Pet. App. 6-7; *State* v. *Hicks*, 488 N.W.2d 359, 363-365 (Neb. 1992), cert. denied, 507 U.S. 1000 (1993); *State* v. *Talbot*, 792 P.2d 489, 493-494 (Utah Ct. App. 1990); *People* v. *Shabaz*, 378 N.W.2d 451, 460-461 (Mich. 1985). Neither of those rationales withstands scrutiny.

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properly be submitted to the jury. See *Allen*, 164 U.S. at 498-499; *Alberty*, 162 U.S. at 508-511; *Hickory*, 160 U.S. at 416-423. The courts of appeals have continued to recognize that evidence of flight may properly be admitted in a criminal trial to show consciousness of guilt. See, *e.g.*, *United States* v. *Candelaria-Silva*, 162 F.3d 698, 705 (1st Cir. 1998); *United States* v. *Amuso*, 21 F.3d 1251, 1258-1259 (2d Cir.), cert. denied, 513 U.S. 932 (1994); *United States* v. *Murphy*, 996 F.2d 94, 96-97 (5th Cir.), cert. denied, 510 U.S. 971 (1993); *United States* v. *Hegwood*, 977 F.2d 492, 498 n.3 (9th Cir. 1992), cert. denied, 508 U.S. 913 (1993); *United States* v. *Pungitore*, 910 F.2d 1084, 1151 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991). Accord, *e.g.*, 2 Wigmore, *supra* § 276, at 122 ("It is universally conceded today that the fact of an accused's flight * * * [is] admissible as evidence of consciousness of guilt, and thus of guilt itself."); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 85 (2d ed. 1994); 2 John W. Strong et al., *McCormick on Evidence* § 263 (4th ed. 1992).

1. Sudden flight from an identifiable police officer may be susceptible of innocent explanations. Investigative detentions are routinely based, however, on conduct that is neither inherently blameworthy nor definitely indicative of criminal behavior. As the Court explained in *Sokolow*,

> "Innocent behavior will frequently provide the basis for a showing of probable cause," and * * * "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." That principle applies equally well to the reasonable suspicion inquiry.

490 U.S. at 10 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 243-244 n.13 (1983)).

Indeed, the point of this Court's *Terry* stop jurisprudence is to enable police officers "to adopt an intermediate response" when they possess a degree of individualized suspicion not rising to the level of probable cause. *Adams*, 407 U.S. at 145. Situations in which probable cause is lacking are by definition situations in which the suspect's behavior is susceptible of an innocent explanation.[7] Thus, "[d]oubtless, many innocent explanations for [respondent's] conduct could be hypothesized, but suspicious activity by its very

[7] Even the probable cause standard applicable to an arrest or full-scale search requires only a "fair probability" that the suspect has committed criminal acts or that the specified items will be found in the location to be searched. *Sokolow*, 490 U.S. at 7; *Gates*, 462 U.S. at 238. "[T]he level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause" and requires "considerably less than proof of wrongdoing by a preponderance of the evidence." *Sokolow*, 490 U.S. at 7.

nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal." *State* v. *Jackson*, 434 N.W.2d 386, 391 (Wis. 1989).[8]

The propriety of the investigative stop in this case therefore does not depend on a showing that respondent's flight unequivocally evidenced his involvement in criminal activity. Rather, the stop was appropriate so long as respondent's behavior provided the "minimal level of objective justification" necessary to satisfy the reasonable suspicion standard. *Sokolow*, 490 U.S. at 7 (quoting *INS* v. *Delgado*, 466 U.S. 210, 217 (1984)). Unprovoked flight from identifiable police officers is ordinarily a sufficiently probative indication of illicit conduct to justify a brief investigative stop. Although

[8] To the extent that innocent people flee from the police, seizures undertaken on the basis of flight will sometimes result in incursions on the liberty of persons who have committed no crime. That prospect, however, does not make such stops unconstitutional. As the Court has explained in the context of searches, the Fourth Amendment's reasonableness requirement

> does not demand that the government be factually correct in its assessment [of] what a search will produce. * * * If a magistrate, based upon seemingly reliable but factually inaccurate information, issues a warrant for the search of a house in which the sought-after felon is not present, has never been present, and was never likely to have been present, the owner of that house suffers one of the inconveniences we all expose ourselves to as the cost of living in a safe society; he does not suffer a violation of the Fourth Amendment.

Illinois v. *Rodriguez*, 497 U.S. 177, 184 (1990). The same principle applies to *Terry* stops—except that the reasonable suspicion standard contemplates a greater willingness to tolerate the seizure of persons who turn out to be innocent, in light of the lesser intrusion that such stops entail.

such flight *may* be undertaken for innocent reasons, it is not behavior in which innocent persons commonly engage. Compare *Reid* v. *Georgia*, 448 U.S. 438, 441 (1980) (circumstances that "describe a very large category of presumably innocent travelers" could not provide the basis for an investigative stop). As the Wisconsin Supreme Court has explained,

> [f]light at the sight of police is undeniably suspicious behavior. Although many innocent explanations could be hypothesized as the reason for the flight, a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well.

State v. *Anderson*, 454 N.W.2d 763, 766 (1990); see also 4 Wayne R. LaFave, *Search and Seizure* § 9.4(f), at 181-182 (3d ed. 1996) (agreeing that "behavior which evinces in the mind of a reasonable police officer an intent to flee from the police is sufficiently suspicious in and of itself to justify a temporary investigative stop by the police").

The Illinois Supreme Court appeared to agree that an individual's flight from the police is relevant to the reasonable suspicion inquiry. It concluded, however, that an investigative detention is permissible only "if there are corroborating circumstances sufficient to create the reasonable suspicion necessary for the stop." Pet. App. 8. As we explain above, unprovoked flight is sufficiently unusual, and sufficiently uncharacteristic of innocent persons, to satisfy the reasonable suspicion standard. There is, however, an additional flaw in the

court's suggestion that officers observing a individual's flight should seek evidence "corroborating" the inference of possible criminal involvement. In many if not most cases, the effect of flight is to foreclose the possibility that close observation of the individual will reveal additional signs of unlawful behavior. An immediate seizure is particularly appropriate in cases, like the present one, in which officers have no practical alternative means of further investigating the suspicious individual. Cf. *Adams*, 407 U.S. at 146 ("A brief stop of a suspicious individual, in order to determine his identity *or to maintain the status quo momentarily while obtaining more information*, may be most reasonable in light of the facts known to the officer at the time.") (emphasis added).

This Court has emphasized that in determining whether an investigative stop was supported by reasonable suspicion, "the totality of the circumstances—the whole picture—must be taken into account." *Cortez*, 449 U.S. at 417. Cases may occasionally arise in which other contextual factors refute the inference of criminal activity that would otherwise attend an individual's flight from identifiable police officers.[9] In this case, however, the only additional circumstance bearing on the reasonable suspicion inquiry was the fact that the episode occurred in a high-crime area. An individual's presence in a high-crime neighborhood is not in itself sufficient to justify an investigative stop.

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[9] For example, an officer who moved towards an individual while shouting threats of violence or instructing people to clear an area could not plausibly construe that person's flight as evidence of involvement in illicit conduct. No such circumstances, however, are present in this case; the flight, instead, was entirely unprovoked.

See *Brown* v. *Texas*, 443 U.S. 47, 52 (1979). Nor is presence in a high-crime area necessary to justify an officer's conclusion that sudden and unprovoked flight from an identifiable police officer gives rise to reasonable suspicion. But presence in such an area may contribute to a finding of reasonable suspicion when combined with other relevant circumstances, such as the flight in this case.[10]

2. In *Florida* v. *Royer*, 460 U.S. 491 (1983), a plurality of this Court stated that an individual who is approached by the police

> need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Id. at 498 (opinion of White, J.) (citation omitted). Some courts—including the Illinois Supreme Court in this case—have concluded that a *Terry* stop based on an individual's flight from the police impairs the individual's right to "go on his way" and is therefore inconsistent with *Royer*. See Pet. App. 6-7 (quoting *Hicks*, 488 N.W.2d at 363-364); *Talbot*, 792 P.2d at 494; *Shabaz*, 378 N.W.2d at 458, 460-461. That reasoning is erroneous.

[10] See, *e.g.*, *United States* v. *Brown*, 159 F.3d 147, 149-150 (3d Cir. 1998), cert. denied, 119 S. Ct. 1127 (1999); *United States* v. *Gutierrez-Daniez*, 131 F.3d 939, 942-943 (10th Cir. 1997), cert. denied, 118 S. Ct. 1334 (1998); *United States* v. *Atlas*, 94 F.3d 447, 450-451 (8th Cir. 1996), cert. denied, 520 U.S. 1130 (1997); *United States* v. *Evans*, 994 F.2d 317, 322 (7th Cir.), cert. denied, 510 U.S. 927 (1993); *United States* v. *Lender*, 985 F.2d 151, 154 (4th Cir. 1993); *United States* v. *Lucas*, 778 F.2d 885, 888 (D.C. Cir. 1985) (per curiam). See also 2 LaFave, *supra* §3.6(g), at 335 ("To require police to disregard facts which, as a practical matter, are highly relevant to the determination of probable cause, would do violence to the underlying purpose of the Fourth Amendment's probable cause requirement and would in fact do a disservice to the 'honest citizen' residing in a high-crime area.") (footnote omitted).

The general constitutional bar on suspicionless seizures of the person reflects the fact that an individual has a liberty interest in pursuing his chosen course of conduct free from official interference. In the *Terry* stop context, that interest may be overridden if, but only if, government officials have an objective basis for suspecting that the individual may be involved in criminal or similar wrongful behavior. The bar on suspicionless seizures would be effectively negated if the police could request that an individual stop voluntarily, and then treat his refusal to do so as the basis for a compulsory stop. Thus, the Court has "consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991). The *Royer* plurality's recognition of the individual's right to "go on his way," 460 U.S. at 498, and its assertion that the exercise of that right cannot provide the basis for a stop, *ibid.*, are best understood to refer to situations in which a person simply refuses to cease or modify his behavior in response to police entreaties.

Respondent, by contrast, did not insist on hewing to his predetermined course of conduct. To the contrary, respondent dramatically altered his behavior in direct response to the officers' arrival, and in an evident attempt to avoid police scrutiny. That pattern of activity is much more aberrational, and much more uncharacteristic of innocent persons, than is a simple insistence on freedom from official interference. To treat such

behavior as grounds for an investigative stop would not permit suspicionless seizures. Had respondent simply ignored the officers, his refusal to alter his behavior in response to their arrival would not have furnished a basis for an investigative stop. Recognition of that principle adequately protects the individual's right to be free from arbitrary government intrusion. It is both unnecessary and counterproductive to take the further step of barring police from drawing the inferences that naturally flow from sudden and dramatic shifts in private conduct.[11]

It is true that no state or federal law prohibited respondent from taking flight when Officer Nolan appeared. In that sense it is accurate to say that respondent had a "right" to flee and could not be punished for that behavior. As we explain above, however (see pp. 14-15, *supra*), *Terry* stops are routinely undertaken on the basis of conduct that is not inherently unlawful.[12] In *Terry* itself, the two suspects simply strolled down a

[11] We do not suggest that police can "force otherwise law-abiding citizens * * * to stand still," Pet. App. 8, or that running in the opposite direction from identifiable law enforcement officers can under all circumstances be regarded as suspicious behavior. A marathoner engaged in a training run could rush past police officers without arousing reasonable suspicion. And that would be so even if the runner ignored a shouted police request for a voluntary interview. Under those circumstances, it would be accurate to say that the individual had "exercise[d] his constitutional right to 'go on his way'—at top speed." *Shabaz*, 378 N.W.2d at 460. The suspicious aspect of respondent's behavior was not running per se. It was the fact that respondent deviated dramatically from his prior course of conduct in response to the officers' arrival, and for the apparent purpose of avoiding police scrutiny.

[12] Indeed, a *Terry* stop will sometimes be appropriate even where police have not observed the suspect engaging in any form of suspicious or unusual conduct. See notes 3, 8, *supra*.

street and peered into a street window, met with and conversed with a third person, and continued on their way—but in a manner that gave rise to the suspicion that they were casing the store for a possible robbery. 392 U.S. at 5-6. The fact that respondent could not be punished for the flight itself did not preclude the police from treating the flight as evidence of possible involvement in criminal activity. Cf. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").[13]

[13] For essentially the same reasons that the investigative stop in this case was permissible, Officer Nolan was justified in conducting a protective pat-down of respondent's person. Respondent's flight suggested both that he might be involved in illicit activity, and that he might be willing to take extreme measures to avoid police questioning. Officer Nolan testified that the area in which the stop occurred was known for "high narcotics traffic," and that in his experience weapons are commonly found in the vicinity of such areas. J.A. 8, 11. Based on those factors, Officer Nolan "had reasonable grounds to believe that [respondent] was armed and dangerous." *Terry*, 392 U.S. at 30. It was also reasonable for Officer Nolan to feel the opaque bag that respondent carried. A weapon could as easily be concealed in the bag—and as quickly retrieved—as if it were hidden under respondent's clothing. Compare *Michigan* v. *Long*, 463 U.S. 1032, 1045-1052 (1983) (police conducting a vehicle stop reasonably searched areas of the car, including a leather pouch, over which the suspect would have immediate control, and that might contain a weapon). Thus, while the right to conduct an investigative stop does not *invariably* include the right to perform a weapons frisk, *id.* at 1049 n.14, the pat-down of respondent and his bag was reasonable under the circumstances of this case.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DEBORAH WATSON
Attorney

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